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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VERSI CORBIN, Defendant and Appellant.	B208609 (Los Angeles County Super. Ct. No. BA304415)

APPEAL from a judgment of the Superior Court of Los Angeles County. Sam Ohta, Judge. Affirmed.

Syda Kosofsky, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and John R. Gorey, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Versi Corbin appeals from a judgment entered after the trial court convicted him of count 1 and count 2, misdemeanor sexual battery on C.H. in violation of Penal Code section 243.4, subdivision (e)(1);[1] count 3, assault with intent to commit a felony on Jennifer R. in violation of section 220; and count 4, sexual penetration by a foreign object on Jennifer R. in violation of section 289, subdivision (a)(1).[2]

Probation was denied and appellant was sentenced to state prison for three years. The trial court imposed the low term of three years on count 4 and stayed the low term of two years on count 3 pursuant to section 654. The trial court imposed concurrent six-month terms on counts 1 and count 2.

Appellant contends that his conviction on count 3, assault with intent to commit a felony in violation of section 220 must be reversed because it is a lesser-included offense of count 4, sexual penetration by a foreign object in violation of section 289, subdivision (a)(1). We disagree with appellant's argument and affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On June 14, 2006, appellant, C.H., and Jennifer R. were residents of a board and care facility. On June 14, 2006, when C.H. opened the door to his knock, appellant entered her room and touched her breasts and vagina through her clothes against her will. Two months previously, appellant had knocked on C.H.'s door, entered, grabbed her and touched her breasts and vagina. She had yelled at him to "get out," and he left.

A few months prior to the June incident, Jennifer R. was in a common area of the facility doing her homework at around 2:00 a.m. Appellant asked Jennifer if she wanted to watch television in his room. Jennifer went to his room and sat on the bed to watch television with him. Appellant tried to hug Jennifer, who pushed him away. Then appellant grabbed Jennifer, pulled her shirt up, and kissed her breasts. Jennifer screamed

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] On December 27, 2006, appellant was found not mentally competent to stand trial within the meaning of section 1368 and placed in Patton State Hospital. Subsequently, on October 17, 2007, the trial court found appellant competent, and ordered him to stand trial and criminal proceedings to resume.

and fought appellant for 40 minutes as he tried to put his hand into her panties. Appellant put his hand in her panties and stuck his fingers into her vagina and moved them around in a "scraping" manner. Appellant testified that Jennifer consented to him putting his fingers in her vagina.

DISCUSSION

Count 3 is not a necessarily included offense to count 4

Appellant contends that count 3, assault with intent to commit penetration with a foreign object (§ 220) is a necessarily-included offense of count 4, forcible penetration with a foreign object (§ 289, subd. (a)(1)), and that both convictions stemmed from the same act. He contends his conviction of count 3 must be reversed because it is a lesser included offense of count 4. We disagree.

Typically, a defendant may be convicted of, though not punished for, more than one crime arising out of the same act or course of conduct. (§ 954; *People v. Reed* (2006) 38 Cal.4th 1224, 1226 (*Reed*).) But, section 654 prohibits multiple punishment for the same act or omission, requiring the trial court to stay execution of sentence on the convictions for which multiple punishment is prohibited. (*Reed, supra,* at p. 1227.) "A judicially created exception to the general rule permitting multiple conviction 'prohibits multiple convictions based on necessarily included offenses.' [Citation.] '[I]f a crime cannot be committed without also necessarily committing a lesser offense, the latter is a lesser included offense within the former.'" (*Ibid.*) In determining whether multiple convictions of charged offenses is proper, we consider the statutory elements test: "if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former." (*Ibid.*)

Hence, we must determine whether a violation of section 289 subdivision (a)(1) cannot be committed without committing a violation of section 220. Section 289, subdivision (a)(1), is violated when "an act of sexual penetration . . . is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person . . . ." Section 220 is violated when any person ". . . assaults another with intent to commit mayhem, rape,

sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 . . . ."[3] Section 240 defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

In support of his argument that assault with intent to commit penetration with a foreign object (§ 220) is a necessarily-included offense of forcible penetration with a foreign object (§ 289, subd. (a)(1)), appellant analogizes to cases holding that assault with intent to commit rape is a necessarily included offense of forcible rape under the statutory elements test. In *In re Jose M*. (1994) 21 Cal.App.4th 1470, the court found that because rape in concert (§ 264.1) requires a rape by force or violence, one charged with rape by force or violence may be found guilty of assault with intent to commit rape, the latter being merely an aggravated form of attempted rape—that is, a form also requiring an assault. (*In re Jose M., supra,* at p. 1477.)[4] Appellant also cites *People v. Moran* (1973) 33 Cal.App.3d 724, 730 [assault with the intent to commit rape is a lesser included offense of rape]; *Ghent v. Woodford* (9th Cir. 2002) 279 F.3d 1121, 1134, fn. 12 [assault with intent to commit rape is a lesser included offense of rape because the offense of assault with intent to commit rape includes every fact necessary for a finding of rape except for the act of penetration]; and *People v. Saunders* (1991) 232 Cal.App.3d 1592, 1598 [assault with intent to commit oral copulation necessarily includes attempted forcible oral copulation].)

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[3] Section 220 was amended in 2006 to read: "(a) Except as provided in subdivision (b), any person who assaults another with intent to commit mayhem, rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 shall be punished by imprisonment in the state prison for two, four, or six years. [¶] (b) Any person who, in the commission of a burglary of the first degree, as defined in subdivision (a) of Section 460, assaults another with the intent to commit rape, sodomy, oral copulation, or any violation of Section 264.1, 288, or 289 shall be punished by imprisonment in the state prison for life with the possibility of parole." (§ 220; Stats. 2006, c. 337 (S.B.1128), § 5, eff. Sept. 20, 2006; Initiative Measure (Prop. 83, § 4, approved Nov. 7, 2006, eff. Nov. 8, 2006).)

[4] The court in *In re Jose M., supra,* 21 Cal.App.4th at page 1477 also analyzed the issue using the accusatory pleading test, which can be used in determining if an *uncharged* crime is a lesser included offense of another. That test is not relevant here.

But we conclude that these cases are inapposite. Section 220 is not a lesser included crime of section 289, subdivision (a)(1) because a violation of section 289, subdivision (a)(1) can occur without a violation of section 220. Sexual penetration is defined in section 289, subdivision (k)(1) as "the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the *defendant's or another person's* genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object." (Emphasis added.) A violation of section 289, subdivision (a)(1) can occur if the defendant penetrates or forces another person to penetrate the defendant or another's genital or anal opening. But, an assault as defined in section 240, is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Under that section, the defendant is the one who must attempt to commit the injury on the victim. Accordingly, while the recipient of the sexual penetration under section 289, subdivision (a)(1) *could be* the defendant, under section 220, the recipient of the sexual penetration *must be the victim and the perpetrator must be the defendant*.

Moreover, section 289, subdivision (a)(1) can be committed without an "unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another," (§ 240) whereas such an assault is required under section 220. Section 289, subdivision (a)(1) prohibits sexual penetration not only by force and violence, but also by the use of duress, menace or fear against the victim or another person. Thus, under section 289, subdivision (a)(1) the defendant may use verbal and psychological threats rather than threats of violent injury to coerce the victim into sexual penetration. (See *People v. Senior* (1992) 3 Cal.App.4th 765, 774 [violation of section 289, subd. (a) occurred where defendant exerted duress against daughter in the form of psychological coercion such as threats to break up the family unit].) But to violate section 220, the defendant must have committed an assault, an attempt plus ability to commit a violent injury. (§ 240.)

We conclude that section 220 is not a lesser included crime of section 289, subdivision (a)(1).

DISPOSITION

The judgment is affirmed.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ